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In The
Supreme Court of the United States

DERICK ANTHONY HENRY,

Petitioner,

v.

ATTORNEY GENERAL OF THE
UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Under 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii), and 1229b(a)(3), lawful permanent residents of the United States must be deported if they commit a "crime of violence," which is defined in 18 U.S.C. § 16(b) as, *inter alia*, a crime that involves a substantial risk of the use of force "in the course of committing the offense." Other statutes also incorporate 18 U.S.C. § 16(b)'s definition.

This case raises the following question:

Does the requirement that an offense involve a substantial risk that force may be used "in the course of committing the offense" mean that there must be a risk that force may be necessary to effectuate the offense rather than that force may eventually be used?

LIST OF PARTIES IN THE COURT BELOW

The following were parties in the court below:

1. Petitioner Derick Anthony Henry; and
2. The Bureau of Immigration and Customs Enforcement, which is a bureau of the Department of Homeland Security, 6 U.S.C. § 252(a)(1), an executive department of the United States of America. 6 U.S.C. § 111(a).

While Petitioner's *pro se* petition for review named the Bureau as respondent in the court of appeals, the proper respondent is the Attorney General of the United States. *See* 8 U.S.C. § 1103(a).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App. 1-16) is reported at 493 F.3d 303 (3d Cir. 2007). The Decision of the Board of Immigration Appeals reviewed by the court of appeals (App. 17-21) is unreported. Similarly, the Immigration Judge's Oral Decision (App. 22-30) cancelling Petitioner's deportation and his Interlocutory Ruling on Aggravated Felony (App. 31-36) are unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (App. 1-16) was entered on July 11, 2007. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which authorizes review by writ of certiorari of judgments of the United States courts of appeals.

STATUTES AND REGULATIONS INVOLVED

This case involves the proper interpretation of 18 U.S.C. § 16(b). Section 16 defines a "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

STATEMENT OF THE CASE

Background

This case raises an important and recurring question concerning the proper interpretation of the term "crime of violence" as defined in 18 U.S.C. § 16(b). Petitioner asks the Court to resolve a conflict among the courts of appeals on the meaning of the final phrase in Section 16(b), which requires that a "crime of violence" involve a substantial risk that force may be used "in the course of committing the offense."

The United States Court of Appeals for the Fifth Circuit has held that unlawful possession of a weapon without further action is not a "crime of violence" under Section 16(b) because it does not involve a substantial risk that force will be used in order to commit the offense of possession. However, the United States Court of Appeals for the Third Circuit held below that possession of a weapon with intent to use it unlawfully is a "crime of violence" under Section 16(b), because "proof of the intent element creates the substantial risk that physical force will be used during the commission of the offense." App. 15. While

the Third Circuit correctly concluded that unlawful possession of a weapon with intent to use it creates a "substantial risk that physical force may be used," it improperly held that the required risk exists "in the course of committing the offense."

The proper interpretation of "crime of violence" under Section 16(b) is crucial to the operation of other statutory schemes which incorporate it, not only the mandatory deportation provision at issue here.

The Facts and Proceedings Below

Petitioner Derick Anthony Henry is a citizen of Jamaica who was lawfully admitted to the United States as a permanent resident in January, 1990. App. 22. In April 1999, Henry, who worked in a store that had been robbed twice while he was there, was approached by a man offering to sell him a gun. App. 25. Henry took the gun into a back room of the store to examine it. *Id.* Within minutes, the police arrived and arrested him. *Id.*

Henry subsequently pleaded guilty under New York Penal Law Section 265.03(1)(b), "Criminal possession of a weapon in the second degree," which provides that "[a] person is guilty of criminal possession of a weapon in the second degree when . . . with intent to use the same unlawfully against another, such person . . . possesses a loaded firearm. . . ." He was sentenced to four years imprisonment but was released on parole after serving over two years.

App. 22, 24. Henry has no prior or subsequent criminal record. App. 24, 27.

Eighteen months after Henry's release from prison, the Department of Homeland Security ("DHS") arrested Henry and ordered him deported pursuant to 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1227(a)(2)(C). Those sections provide that aliens are removable from the United States for possession of a firearm in violation of any law, or for conviction for an "aggravated felony." An "aggravated felony" includes, *inter alia*, a "crime of violence," which is defined in 18 U.S.C. § 16 as

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

8 U.S.C. § 1101(a)(43)(F). Henry's guilty plea was the sole basis for both grounds for deportation.

Henry applied *pro se* for cancellation of the deportation order under 8 U.S.C. § 1229b(a), which permits the discretionary cancellation of a removal order in certain circumstances, as long as the permanent resident has not been convicted of an "aggravated felony." In an Interlocutory Ruling, the Immigration Judge agreed that Henry had not been

convicted of an "aggravated felony" because his possession offense was not a "crime of violence." App. 31-36. The Immigration Judge reasoned that "[o]ne may violate the [possession] statute without any utilization of 'physical force,'" and that "the intention to use a loaded weapon unlawfully against another is not the same as using the weapon. . . ." App. 34-35. He later held a hearing to determine whether to exercise his discretion to cancel Henry's removal under Section 1229b(a). After finding that Henry "testified credibly" and recognizing that Henry had no criminal record other than the possession guilty plea, the Immigration Judge cancelled the removal order. App. 22-30.

DHS appealed the Immigration Judge's ruling to the Board of Immigration Appeals. DHS argued that Henry had in fact pleaded guilty to a "crime of violence," so that the Immigration Judge did not have discretion to cancel Henry's deportation. App. 20-21.

The Board of Immigration Appeals ruled that Henry's crime was a "crime of violence" because,

> [g]iven the virtually unavoidable consequence of physical injury that will result from using a loaded firearm against another person, . . . the New York conviction involves a "substantial risk of physical force". . . .

App. 21. The Board did not address Section 16(b)'s requirement that the risk of physical force must arise "in the course of committing the offense." It ordered Henry deported to Jamaica. *Id.*

Henry petitioned the United States Court of Appeals for the Third Circuit for review of the Board's decision. *See* 8 U.S.C. § 1252(a). The court of appeals affirmed, denying Henry's petition for review. App. 1-16.[1]

While the court of appeals agreed that "possession alone does not permit the inference that there is a substantial risk of the use of force," it relied on its prior decision in *Impounded*, 117 F.3d 730 (3d Cir. 1997), decided under a different but similar statute, to find that "proof of the intent element creates the substantial risk that physical force will be used during the commission of the offense." App. 14-15. In *Impounded*, the court held that a juvenile convicted (*inter alia*) of possession of a weapon with intent to use it unlawfully had committed a "crime of violence" under 18 U.S.C. § 5032, relying in part on cases that interpreted the definition of "crime of violence" contained in Section 4B1.2(a)(2) of the United States Sentencing Commission Guidelines Manual. *Impounded*, 117 F.3d at 738, fn. 13. The court of appeals here concluded that "certainly if someone intends to use physical force there is a substantial risk that physical force may be used." App. 12.

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[1] The government did not argue that, and the court of appeals did not consider whether, Henry's offense was a "crime of violence" under Section 16(a). App. 7, fn. 2.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision below extends a circuit split on the meaning of one of the dispositive elements of Section 16(b)'s definition of a "crime of violence": the requirement that the offense involve a substantial risk that force may be used "in the course of committing the offense." 18 U.S.C. § 16(b). The Fifth Circuit has explicitly held that this element requires a substantial risk that the offender may use force *in order to complete the elements of the offense*, or *as a means of effectuating the offense*. However, the decision below and those of other circuits have either explicitly or implicitly held that Section 16(b) requires only that there be a substantial risk that the use of force may occur at some time, as a result of commission of the offense.

These two conflicting interpretations of "in the course of committing the offense" are often dispositive on the question of whether an offense is a "crime of violence" under Section 16(b). Weapons possession crimes are a prime example, because violent acts committed with a weapon necessarily occur as a result of possession of the weapon; under the Third Circuit's rationale, all possession crimes that create a risk of physical force do so "in the course of committing the offense." On the other hand, few, if any, weapons possession crimes present a risk that violence will be used for the purpose of perpetrating the possession offense itself, because all elements of a possession offense are satisfied as soon as the offender takes

possession of the weapon and has the requisite mental state. Thus, whether unlawful possession of a weapon alone is, without more, a "crime of violence" turns on the proper interpretation of the term "in the course of committing the offense." If Section 16(b) requires only that the offense involve a risk that physical force may sometimes occur, then a possession offense, without more, is a "crime of violence." However, if Section 16(b) requires that a "crime of violence" must involve a risk that physical force will be used *in order to perpetrate the offense of possession*, then unlawful possession of a weapon, with or without intent to use it, is not a "crime of violence."

Whether an offense is a Section 16 "crime of violence" profoundly affects substantial individual rights. In this case, as in many similar cases, the classification of an offense as a "crime of violence" mandates that a lawful permanent resident of the United States – including, here, one with a minor child who is a U.S. citizen – be deported to a country that the permanent resident had not lived in for more than ten years even though those years were, with the exception of the possession offense, conviction-free. In other cases, Section 16's "crime of violence" definition forms the basis for conviction of another, separate crime. *See, e.g.*, 18 U.S.C. §§ 842(p)(2)(A) (unlawful to teach another to use, *inter alia*, an explosive, knowing or intending that the other will use the explosive for a crime of violence), 1952(a)(2) (unlawful to travel interstate with intent to commit a crime of violence).

Review of this case would allow the Court to resolve widespread uncertainty as to the scope of Section 16(b)'s definition of a "crime of violence," which currently causes the disparate application in different circuits of the deportation statute to lawful permanent residents convicted of the same crime, and will cause inconsistent convictions under other criminal statutes that incorporate Section 16.

I. The Third Circuit Has Interpreted A Federal Criminal Statute That Has Important Immigration Law Consequences In A Way That Conflicts With Recent Rulings Of The Fifth Circuit.

A. Several Circuits Disagree Over The Meaning Of "In The Course Of Committing The Offense."

1. In *United States v. Medina-Anicacio*, 325 F.3d 638, 646 (5th Cir. 2003), *reh'g denied*, 91 Fed. Appx. 975 (5th Cir.), *cert. denied*, 542 U.S. 911 (2004), the United States Court of Appeals for the Fifth Circuit held that an offense is a "crime of violence" under Section 16(b) only when it presents a substantial risk that physical force may be "necessary to effectuate the offense." Thus, the court held, possession of a concealed dagger is not a "crime of violence" under Section 16(b) "because there is no substantial risk that an offender may use violence *to perpetrate the* [*possession of a deadly weapon*] *offense*." *Id.* at 647 (emphasis added). The Fifth Circuit has also held that possession of a short-barrel firearm is not a crime of violence under

Section 16(b), because "physical force against the person or property of another *need not be used to complete the crime.*" *United States v. Diaz-Diaz*, 327 F.3d 410, 413 (5th Cir.), *cert. denied*, 540 U.S. 889 (2003) (emphasis in original). *See also United States v. Hernandez-Neave*, 291 F.3d 296, 299 (5th Cir. 2001) (possession of a handgun on the premises of a business licensed to sell alcohol is not a "crime of violence" under Section 16(b) because force "need not be used to complete the crime"). Contrary to the Third Circuit's holding here, App. 15, the Fifth Circuit noted in each of these cases that possession crimes are complete upon possession of the weapon and the requisite mental state. *Diaz-Diaz*, 327 F.3d at 414; *Medina-Anicacio*, 325 F.3d at 645-46; *Hernandez-Neave*, 291 F.3d at 299.

The United States Courts of Appeals for the Second and the Fourth Circuits apparently view Section 16(b)'s "in the course of committing the offense" requirement similarly to the Fifth Circuit. *See, e.g., Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003) (involuntary manslaughter is not a crime of violence because "the risk in section 16(b) concerns the defendant's likely use of violent force *as a means to an end*") (emphasis added); *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 446-47 (4th Cir. 2005) (same).

Here, however, the Third Circuit rejected Henry's argument that Section 16(b) is meant to embrace only those crimes that involve substantial risk that force will be used in order to commit the offense in question. App. 13. Instead, the court below relied upon one of its prior decisions that based its holding in large

part on a different statute, *see Impounded*, *supra*, to hold that Henry's offense "create[d] the substantial risk that physical force will be used *during*" his unlawful possession of the firearm. App. 15 (emphasis added). It so held because an element of the offense to which Henry pleaded guilty is intent to use the weapon unlawfully against another. The United States Court of Appeals for the Ninth Circuit has cast the Section 16(b) net even wider than the Third Circuit, holding that a possession offense that does not require intent to use the weapon against another – the offense of being a felon in possession of a firearm – is a "crime of violence" because "the history of the firearm laws reveals the strong congressional conviction that an armed felon poses a substantial threat to all members of society." *United States v. O'Neal*, 937 F.2d 1369, 1375 (9th Cir. 1991) (interpreting "crime of violence" under Section 16(b) in applying the pre-1989 version of Sentencing Guideline § 4B1.2, which incorporated Section 16 by reference).

2. The question concerning the meaning of "in the course of committing the offense" arises in interpreting a definition of "crime of violence" identical to Section 16(b) that is contained in the Bail Reform Act, 18 U.S.C. §§ 3141-56. The Bail Reform Act permits pre-trial and pre-sentencing detention of an offender convicted of a "crime of violence" as defined in 18 U.S.C. § 3156(a)(4)(B), under certain circumstances. Section 3156(a)(4)(B) defines "crime of violence" as, *inter alia*,

> An offense that is a felony and that, by its nature, involves a substantial risk that physical

> force against the person or property of another may be used in the course of committing the offense.

In *United States v. Dillard*, 214 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 907 (2001), the Second Circuit held that a conviction of being a felon in possession of a firearm is a "crime of violence" under Section 3156(a)(4)(B). The majority and dissenting opinions in *Dillard* succinctly present the two conflicting interpretations of the phrase "in the course of committing the offense." The majority held that a felon's mere possession of a firearm is a crime of violence. It reasoned that the "in the course of committing the offense" language is satisfied because any eventual violence would "necessarily occur[] during the possession of the gun":

> [i]f that possession is illegal because the possessor is a convicted felon who is forbidden from possessing a gun, the violent use will inevitably have occurred in the course of the commission of the offense of illegal possession.

Id. at 93-94. The dissent, on the other hand, used the same reasoning that the Fifth Circuit later adopted in *Medina-Anicacio*, *supra*. It argued that

> The critical limitation in this definition is the requirement that the risk of physical force must arise "in the course of committing *the offense*." This phrase, taken as a whole, plainly refers only to the actions or conditions necessary to satisfy each element of

> "the offense." Here, the offense is the possession of a weapon by a felon. . . . No element other than the possession of a weapon by a felon is needed for conviction. What a felon does or does not do with the weapon neither adds to, nor subtracts from, that offense.

Id. at 104-05 (emphasis in original).

The dissent in *Dillard* went on to describe the "in the course of committing the offense" provision as "limiting language," stating that "[a] felon who subsequently uses the weapon against another person is 'in the course of committing' another offense, not 'in the course of committing the [felon-in-possession] offense.'" *Id.* at 105. *See also, e.g., United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999), *aff'd on other grounds*, 13 Fed. Appx. 4 (D.C. Cir. 2001) (crime of possession of a weapon by a felon is not a "crime of violence" under Section 3156(a)(4)(B)); *compare, e.g., United States v. Rogers*, 371 F.3d 1225 (10th Cir.), *rev'd on other grounds*, 391 F.3d 1165 (10th Cir. 2004) (crime of possession of a weapon while subject to a domestic protection order is a "crime of violence" under Section 3156(a)(4)(B)).

Without resolution by this Court, the lower courts will continue to disagree over whether a "crime of violence" is one that involves a substantial risk that physical force may subsequently result, App. 15, or one that involves a risk that force will be used *in order to commit* the offense. Until then, the "always [] harsh measure" of deportation, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), will continue to be imposed inconsistently to permanent residents

convicted of the same crime. Likewise, other important criminal statutes, including those that govern whether a defendant may be held without bail, will also be interpreted inconsistently.

B. The Issue Presented By The Conflict Is Of Great Significance.

The conflict in the courts of appeals on this issue is significant because, as in this case, it may determine the right of many lawful permanent residents of the United States to continue their residence in America.

Immigration judges often have discretion to cancel removal orders after considering the individual facts and circumstances surrounding each case, including the individual alien's personal circumstances and relationship with the United States. *See* 8 U.S.C. § 1229b. However, there is no such discretion when the permanent resident has been convicted of a "crime of violence." *See* 8 U.S.C. §§ 1101(a)(43)(F) and 1229b(a)(3). Once the "crime of violence" label is applied, the alien's deportation is mandatory, regardless of the actual facts of the crime and the hardship that it may inflict. This can be especially severe for the many lawful permanent residents who, like Henry, immigrated to the United States years ago and have children who are United States citizens. As this Court has recognized, "[d]eportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

This Court's clarification of Section 16(b) will also have a significant impact beyond immigration cases because, as noted, a number of statutes either explicitly or implicitly incorporate Section 16's definition of "crime of violence." For example, 18 U.S.C. § 1952(a)(2) prohibits, *inter alia*, interstate travel in order to commit a "crime of violence" as defined by Section 16(b) "in furtherance of unlawful activity." 18 U.S.C. § 1952(a)(2); *see also, e.g., id.* § 842(p)(2)(A). In each of these areas, a consistent rule of law is crucial to the evenhanded enforcement of the law.

II. The Court Below Erred In Concluding That The Possession Offense To Which Petitioner Pleaded Guilty Involves A Risk That Violence May Occur "In The Course Of Committing The Offense."

The Fifth Circuit's interpretation of the phrase "in the course of committing the offense" to mean that violence may be "necessary to effectuate the offense," *Medina-Anicacio*, 325 F.3d at 646, is the correct one. This interpretation gives meaning to each separate element of the "crime of violence" definition in Section 16(b). Moreover, it draws a distinction between the "classic" Section 16(b) crime of burglary (*see Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004)) – which involves a substantial risk that the perpetrator may use force in order to commit the burglary – and possession crimes, the elements of which do not present a risk that violence will be used in order to commit them.

The Fifth Circuit's interpretation is consistent with the language this Court used in *Leocal*. Although *Leocal* did not involve the issue raised here, the Court there stated that Section 16(b)'s risk of force "relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another *might be required in committing a crime*." *Leocal*, 543 U.S. at 10 (second emphasis added). The Court also described the risk involved as that of "having to use [physical] force in committing a crime." *Id.* at 11.

The Third Circuit's interpretation of Section 16(b) in effect reads the phrase "in the course of committing the offense" out of the statute. By holding that the substantial risk of physical force may arise at any time, the Third Circuit instead applied the standard now set forth in Section 4B1.2 of the Sentencing Guidelines Manual, which defines "crime of violence" as merely one that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Section 4B1.2's definition of "crime of violence" is much broader than that in Section 16(b) because it requires only a substantial risk that "injury will result," and does not contain the additional requirement that the risk occur "in the course of committing the offense." *See Leocal*, 543 U.S. at 10, fn. 7 (Section 16(b) "plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct").

The Third Circuit's error resulted in part from its reliance on *Impounded*, *supra*. The court there held that a juvenile convicted of, *inter alia*, possession of a weapon with intent to use it could be tried as an adult under 18 U.S.C. § 5032 because the possession with intent offense "by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense." *Impounded*, 117 F.3d at 738. It stated that the juvenile's crime "satisfie[d] the requirement[] . . . that the charged offense by its very nature involve[] a 'substantial risk that physical force . . . may be used' during the commission of the crime." *Id. Impounded* relied heavily on cases interpreting the broader standard in Section 4B1.2 of the Sentencing Guidelines Manual. *Id.* at fn. 13. As a result, the court below erred in relying on it. *See Leocal*, 543 U.S. at 10, fn. 7.

The court below also confused the effect of the distinction between "simple" possession of a weapon and possession with intent to use the weapon. App. 12 (agreeing that "possession alone does not permit the inference that there is a substantial risk of the use of force," but finding that "certainly if someone intends to use physical force there is a substantial risk that physical force may be used"). That distinction goes to whether there is a "risk of the use of force" under Section 16(b), not whether force may be used "in order to commit the [possession] offense."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3064

DERICK ANTHONY HENRY,
Petitioner

v.

BUREAU OF IMMIGRATION
AND CUSTOMS ENFORCEMENT,
Respondent

On Petition for Review of Final Decision of the
Board of Immigration Appeals
(BIA No. A42-259-751)
Immigration Judge: Walter Durling

Argued April 12, 2007
Before: SMITH and COWEN, *Circuit Judges*,
and YOHN, *District Judge**

(Filed: July 11, 2007)

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* The Honorable William H. Yohn Jr., Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

YOHN, *District Judge*.

Derick A. Henry petitions for review of a final order by the Board of Immigration Appeals ("BIA") that ordered Henry removed. The BIA held that Henry's conviction of criminal possession of a weapon in the second degree under New York Penal Law Section 265.03 ("§ 265.03") constitutes a crime of violence under 18 U.S.C. § 16(b) and, therefore, an

aggravated felony supporting removal. For the reasons stated herein, we will affirm the BIA and deny Henry's petition for review.

I. Factual and Procedural History

Henry is a native of Jamaica and has been a lawful permanent resident since January 3, 1990. In 2000, Henry was arrested in New York and subsequently pleaded guilty to criminal possession of a weapon in the second degree under § 265.03. The specific charge in the Indictment to which Henry pleaded guilty stated: "The defendant, in the County of Westchester and State of New York, on or about April 8, 1999, did possess a loaded firearm, to wit, a .357 Magnum caliber Astro revolver, with intent to use the same unlawfully against another person. This is an Armed Felony Offense." Section 265.03 provides:

> A person is guilty of criminal possession of a weapon in the second degree when:
>
> (1) with intent to use the same unlawfully against another, such person:
>
> (a) possesses a machine-gun; or
>
> (b) possesses a loaded firearm; or
>
> (c) possesses a disguised gun; or
>
> (2) such person possesses five or more firearms; or

> (3) such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business.

Criminal possession of a weapon in the second degree is a class C felony. § 265.03. Henry was sentenced to four years of imprisonment.

Based on this conviction, the Department of Homeland Security ("DHS") charged Henry with removabilty pursuant to 8 U.S.C. § 1227(a)(2)(C) for possession of a firearm and pursuant to § 1227(a)(2)(A)(iii) as an aggravated felon.[1] Section 240(A) of Immigration and

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[1] The provisions pursuant to which Henry was charged with removabilty state, in relevant part:

> (a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:
>
> . . . .
>
> (2) Criminal offenses.
>
> (A) General crimes.
>
> . . . .
>
> (iii) Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable.
>
> . . . .
>
> (C) Certain firearm offenses. Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using,

(Continued on following page)

Nationality Act, 8 U.S.C. § 1229b, allows for the cancellation of removal of certain permanent residents, but specifically precludes cancellation in the case of an alien who has been convicted of an aggravated felony. The term "aggravated felony" is defined by 8 U.S.C. § 1101(a), and includes a crime of violence, as defined by 18 U.S.C. § 16. *See* § 1101(a)(43)(F).

The Immigration Judge ("IJ") found Henry removable for having been convicted of a firearms offense but, after reviewing Henry's history and testimony, the IJ exercised his discretion to cancel the removal of Henry as permitted pursuant to § 1229b.

The IJ also concluded that Henry's conviction did not constitute an aggravated felony. The DHS appealed the IJ's decision to the BIA, arguing that the IJ had incorrectly held that Henry had not committed an aggravated felony. The BIA reversed, holding that Henry's conviction of criminal possession in the second degree constituted an aggravated felony because "a crime that involves possession of a loaded firearm with the intent to use the firearm unlawfully against another, 'by its nature, involves a substantial risk that physical force against the person or property

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owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

8 U.S.C. § 1227(a)(2).

of another may be used in the course of committing the offense,'" and was thus a crime of violence. (J.A. 010 (quoting § 16(b)).) As such, Henry was ineligible for cancellation of removal and the BIA ordered him removed. Henry timely filed a petition for review.

II. Jurisdiction and Standard of Review

Under the REAL ID Act, we exercise jurisdiction to review "constitutional claims or questions of law raised upon a petition for review." 8 U.S.C. § 1252(a)(2)(D). Whether Henry's conviction constitutes an aggravated felony presents a question of law within our subject matter jurisdiction over which we *exercise plenary review. Garcia v. Att'y Gen. of the U.S.*, 462 F.3d 287, 291 (3d Cir. 2006). We do not defer to the BIA's determination of whether a crime constitutes an aggravated felony. *Singh v. Ashcroft*, 383 F.3d 144, 151 (3d Cir. 2004).

III. Discussion

The issue before us is whether Henry's conviction for criminal possession of a firearm constitutes an aggravated felony. The term "aggravated felony" is defined by § 1101(a) as, *inter alia*, "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year." § 1101(a)(43)(F). In turn, under § 16:

The term "crime of violence" means –

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[2]

§ 16. Because an alien convicted of an aggravated felony is ineligible for cancellation of removal pursuant to § 1229b, if Henry's crime constitutes an aggravated felony, then the BIA correctly ordered Henry removed. If not, the petition for review should be granted.

To determine if a person was convicted of a crime of violence within the meaning of § 16, the court employs the "categorical" approach. *Oyebanji v. Gonzales,* 418 F.3d 260, 262 (3d Cir. 2005) (citing *Taylor v. United States,* 495 U.S. 575, 602 (1990)). This requires us "to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal v. Ashcroft,* 543 U.S. 1, 7 (2004). However, the categorical approach does not bar us from determining

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[2] The BIA did not find and the government does not argue that Henry's conviction is encompassed by § 16(a); therefore, that section is not relevant here.

which numbered subsection was violated where, as here, the disjunctive phrasing of the statute of conviction invites inquiry into the specifics of the conviction. *Tran v. Gonzales,* 414 F.3d 464, 469 n.4 (3d Cir. 2005); *Singh,* 383 F.3d at 162. Accordingly, we examine the conduct covered by § 265.03(1)(b) – possession of a loaded firearm with intent to use the same unlawfully against another.

In *Leocal,* the Supreme Court addressed the mental state necessary for a crime of violence under § 16(b) and held that § 16(b) "requir[es] a higher *mens rea* than [ ] merely accidental or negligent conduct." *Leocal,* 543 U.S. at 11. In *Tran,* decided after *Leocal,* we reaffirmed our precedent from *United States v. Parson,* 955 F.2d 858 (3d Cir. 1992), which held that neither does a reckless state of mind suffice to satisfy the requirements of § 16(b). *Tran,* 414 F.3d at 470-72. Accordingly, "§ 16(b) crimes are those raising a substantial risk that the actor will intentionally use force in the furtherance of the offense." *Id.* at 471 (emphasis omitted). Stated another way, "a crime of violence under § 16(b) must involve a substantial risk that the actor will intentionally use physical force in committing his crime." *Id.* at 472. Thus, applying the categorical approach and our § 16(b) jurisprudence, our inquiry is whether the possession of a loaded firearm with intent to use the same unlawfully against another involves a substantial risk that the actor will intentionally use physical force in committing his crime.

This court has already addressed this same question, albeit under different statutes. In the case *Impounded,* 117 F.3d 730 (3d Cir. 1997), a panel of this court considered whether a juvenile had committed an act within a class of crimes defined by 18 U.S.C. § 5032 so as to render him subject to mandatory transfer from juvenile status to prosecution as an adult in federal district court. *Impounded,* 117 F.3d at 731. The language of § 5032 that defines acts mandating transfer is in all material respects identical to § 16(b): "a juvenile who is alleged to have committed an act . . . which if committed by an adult would be a felony offense . . . that, by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense." § 5032. Although the juvenile was charged with other crimes that clearly met the definition of an act mandating transfer, the panel specifically examined the possession crime with which the juvenile was charged. *Impounded*, 117 F.3d at 737 n.10. The court employed the categorical approach, looking at the statute of conviction, Section 2251(a)(2) of Title Fourteen of the Virgin Islands Code ("§ 2251(a)(2)"), to determine whether it met the definition in § 5032. *Id.* at 738 & n.11. The language of the possession crime at issue in *Impounded* tracks the language of the New York criminal statute under which Henry was convicted, punishing a person who "with intent to use the same unlawfully against another, has, possesses, bears, transports, carries or has under his proximate control, a dagger, dirk, dangerous knife, razor, stiletto, or any other dangerous or deadly

weapon." § 2251(a)(2). Examining two statutes that for all relevant purposes are identical to the statute of conviction and enumerating statute applicable to Henry, we concluded in *Impounded*: "Certainly if someone intends to use a dangerous weapon then there is 'substantial risk that physical force . . . may be used.' Therefore, § 2251(a)(2) satisfies . . . the § 5032 mandatory transfer provisions." *Impounded*, 117 F.3d at 738.[3,4]

In interpreting § 2251(a)(2), we drew upon cases involving determinations of whether a felon-in-possession crime constituted a "crime of violence," as defined by the Sentencing Guidelines. *Impounded*, 117 F.3d at 738 n.13. We explained that prior to the 1991 amendment to the Guidelines,[5] courts relied on

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[3] Stated another way, we held:

> Because the possession crime includes as an element of the offense the intent to use a dangerous weapon, and the commission of the crime will therefore present a substantial risk that physical force will be used, we hold that the possession crime satisfies the requirements of the § 5032 mandatory transfer provisions.

Impounded, 117 F.3d at 731.

[4] In the margin, we also opined that the elements of § 2251(a)(2) satisfy the requirements of § 16(b). *Impounded*, 117 F.3d at 738 n.12. This was dictum in *Impounded* and it is here we write to affirm that proposition, applying the reasoning in *Impounded* to the statutes at issue.

[5] The application notes were amended, effective November 1, 1991, to state: "The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." U.S. Sentencing Guidelines Manual § 4B1.2 cmt. n.2 (1992).

the following inferential analysis: "mere possession may imply intent to use. . . . The intent to use in turn creates the substantial risk of the use of physical force." *Id.* After amendment, the Sentencing Commission made the first inferential step (possession implies intent to use) impermissible. *Id.* However, we reasoned in *Impounded* that because § 2251(a)(2), the Virgin Islands statute, required proof of intent, intent did not have to be inferred as was no longer permissible; accordingly, the reasoning of the second inferential step (intent to use creates the substantial risk of the use of force) remained unchanged and was relied on. *See id.*

Henry asserts that *Leocal* undermines the reasoning of *Impounded* because *Leocal* prohibits reliance on the definition of a "crime of violence" contained in the Sentencing Guidelines, which he contends was the basis for the court's holding in *Impounded*. The *Leocal* Court noted specifically that the definition of a "crime of violence" under the Sentencing Guidelines is not the same as the definition of a "crime of violence" under § 16(b). 543 U.S. at 10 n.7; *see also United States v. Hull,* 456 F.3d 133, 139 (3d Cir. 2006) ("The *Leocal* Court rejected, as dissimilar and insufficient, the definition and interpretation of U.S.S.G. § 4B1.2(a)(2)'s definition of 'crime of violence,' which required only 'conduct which presents a serious potential risk of physical injury to another.'"). However, before the Sentencing Guidelines were amended in

1989, the term "crime of violence" was defined by § 16.[6] Therefore, cases interpreting § 16 in the sentencing context remain relevant. *See Tran,* 414 F.3d at 470 n.5 ("The fact that *Parson* interpreted § 16 in the Sentencing Guidelines context, while we now interpret it in the immigration context, does not prevent our interpretation of § 16 in that case from binding us now."). Our analysis that the intent to use creates a substantial risk of the use of physical force thus remains intact and we are bound by it. *See* 3d Cir. Internal Operating P. 9.1 ("[T]he holding of a panel in a precedential opinion is binding on subsequent panels."). Regardless, the proposition is sound: certainly if someone intends to use physical force there is a substantial risk that physical force may be used.

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[6] Prior to amendment, § 4B1.2 stated: "The term 'crime of violence' as used in this section is defined under 18 U.S.C. § 16." U.S. Sentencing Guidelines Manual § 4B1.2(1) (1989). Effective November 1, 1989, the Guidelines were amended to define a "crime of violence" as:

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S. Sentencing Guidelines Manual § 4B1.2 app. C, amend. 268 (2006).

Henry argues that the crime at issue cannot be a crime of violence because the final element of § 16(b) – the requirement that the substantial risk of the use of force arise in the course of committing the offense- is not met. Henry cites *Hull* for authority, contending at oral argument that *Hull* "repeatedly emphasized that the focus is on whether or not the risk of physical injury arises during the course of committing the crime," and that "when the individual possesses the weapon with the intent to use, at that point, the crime is complete, any additional [ ] effect of that, which we don't look at in this analysis, is a different crime." In other words, Henry asserts that once the offense is complete – at the moment Henry possessed the weapon and had a thought of intending to use that weapon against another – he could no longer act during the commission of the crime and any further actions constitute another crime entirely. We disagree with this analysis.

In *Hull,* we found that the mere possession of a pipe bomb does not constitute a crime of violence under § 16(b) because "[t]here is no risk that physical force might be used against another to commit the offense of *possession*." 456 F.3d at 139 (emphasis in original). Thus, we did not take into account the ultimate purpose of the pipe bomb, as it was not part of the offense. *Id.* Similarly, in *United States v. Bowers,* 432 F.3d 518 (3d Cir. 2005), we concluded, under the largely identical provisions of the Bail Reform

Act,[7] that "the mere fact that the particular individual who possesses a firearm is a felon does not permit an inference that he will use the weapon violently." *Bowers,* 432 F.3d at 521-22. This is because possession alone does not permit the inference that there is a substantial risk of the use of force. *See id.* at 521 (stating that "unwarranted 'factual assumptions'" are required to establish "'a direct relationship between [possession of a firearm] and a risk of violence'" (quoting *United States v. Singleton,* 182 F.3d 7, 14 (D.C. Cir. 1999))).

However, the statute in *Impounded* and the New York statute under which Henry was convicted both require proof not only of possession but also of intent to use a weapon unlawfully against another, whereas

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[7] The Bail Reform Act of 1984 requires a court to hold a detention hearing upon motion by the government if the defendant is charged with a crime of violence. 18 U.S.C. § 3142(f)(1)(A). The Act then lists factors a court must consider in deciding whether to release a defendant pending trial, including whether the offense is a crime of violence. § 3142(g)(1). For purposes of these provisions, the term "crime of violence" means:

> (A) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another;
>
> (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense; or
>
> (C) any felony under chapter 109A, 110, or 117.

§ 3156(a)(4).

in *Hull* and *Bowers* we considered only the crime of possession, without the concomitant element of intent to use the weapon unlawfully. Intent means "either that (1) it was [the defendant's] conscious desire or purpose to act in a certain way or to cause a certain result, or that (2) [the defendant] knew that [he or she] was acting in that way or would be practically certain to cause that result." 3d Cir. Model Criminal Jury Instr. § 5.03 (2006). Under *Impounded,* proof of the intent element creates the substantial risk that physical force will be used during the commission of the offense. Under *Hull,* proof of the intent element satisfies the requirement that § 16(b) "crimes are those raising a substantial risk that the actor will intentionally use force in the furtherance of the offense." 456 F.3d at 140 (internal quotation and emphasis omitted).

Henry's reading of *Hull* is also too narrow because it would prevent burglary – the paradigmatic § 16(b) crime as discussed by the Supreme Court in *Leocal* – from being considered a crime of violence under § 16(b). *See Leocal,* 543 U.S. at 10 (describing burglary as "[t]he classic example"). Generic burglary requires "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor,* 495 U.S. at 598. As such, the requisite elements of a burglary are complete once the burglar enters and possesses the necessary mental intent. However, the substantial risk that the burglar will use force comes from the possibility that the burglar will encounter another

during the course of the burglary; it is irrelevant that the technical elements have already been accomplished. *See Leocal,* 543 U.S. at 10 (concluding that "[a] burglary would be covered under § 16(b) . . . because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime"); *see also James v. United States*, 127 S.Ct. 1586, 1594-95 (2007) (stating the risk of burglary "arises not from the completion of the burglary, but from the possibility that an innocent person might appear while the crime is in progress"); *Parson,* 955 F.2d at 866 (noting that "a burglar of a dwelling risks having to use force if the occupants are home and hear the burglar").

Accordingly, we conclude that possession of a weapon with intent to use the same unlawfully against another, as described in § 265.03, is a crime of violence within the meaning of § 16(b). Thus, we will affirm the BIA and deny Henry's petition for review.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A42 259 751 – York Date: May 18, 2005

In re: DERICK ANTHONY *HENRY* a.k.a. Daniel Crush a.k.a. Henry Derrick a.k.a. Henry Derick

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David J. Chapman, Esquire

ON BEHALF OF DHS: Maureen C. Gaffney
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] – Convicted of firearms or destructive device violation

APPLICATION: Cancellation of removal under section 240A

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) appeals from the August 16, 2004, oral decision of the Immigration Judge, which found the

respondent removable as charged only under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C), and granted the respondent cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a). The DHS challenges the Immigration Judge's interlocutory order dated June 25, 2004, dismissing the aggravated felony charge under section 237(a)(2)(A)(iii) of the Act, and the subsequent discretionary grant of cancellation of removal. The appeal will be sustained.

The record reflects that the respondent was convicted on June 8, 2000, in the Supreme Court of New York, Westchester County, of criminal possession of a weapon in the second degree, in violation of section 265.03 of the New York Penal Law, and sentenced to 4-years imprisonment (Exh. 2-B). The DHS contends that the respondent's conviction is an aggravated felony under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F), for a crime of violence.

Section 101(a)(43)(F) of the Act defines an aggravated felony as "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment imposed [is] at least 1 year." There is no dispute that the respondent's conviction failed to satisfy the elements of a crime of violence under 18 U.S.C. § 16(a). Further, there is no contest that his offense is a felony. In determining whether the respondent's conviction fits within the definition of a crime of violence pursuant to 18 U.S.C. § 16(b),

we look to the statute itself. Section 265.03 of McKINNEY'S PENAL LAW provides,

> A person is guilty of criminal possession of a weapon in the second degree when, with intent to use the same unlawfully against another:
>
> (1) He possesses a machine-gun; or
>
> (2) He possesses a loaded firearm; or
>
> (3) He possesses a disguised gun.
>
> Criminal possession of a weapon in the second degree is a class C felony.

The respondent argues that the focus of our examination of the New York criminal possession of a weapon statute should be the act of *possession*. However, our analysis of the statute does not end with mere possession. In the instant case, we apply a modified categorical approach, and, looking to the record of conviction and Count 4 of the indictment, we find that the respondent was convicted under subsection (2) of section 265.03, which requires proof of intent to use a loaded firearm unlawfully against another. *See Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (categorical approach applied). As stated in the recent Supreme Court decision, *Leocal v. Ashcroft*, 125 S.Ct. 377, 383 (2004), the definition of crime of violence under 18 U.S.C. § 16(b).

> simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another

> in committing an offense. The reckless disregard in § 16 relates *not* to the general conduct or to the possiblitiy that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime.

(emphasis in original). The definition of the term "use" in sections 16 (a) and (b) are interpreted similarly, to require a higher degree of intent than negligent or merely accidental conduct. *Id.* at 382. *See Penuliar v. Ashcroft*, 395 F.3d 1037 (9th Cir.2005) (in applying *Leocal* the court found that the California offense of evading an officer is not a crime of violence as willful and wanton conduct could be found by negligently committing three Vehicle Code violations). In other words, the term use in the federal statute requires "active employment." *Leocal v. Ashcroft*, *supra*.

We find that a crime that involves possession of a loaded firearm with the intent to use the firearm unlawfully against another "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). *See Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). We therefore conclude that the Immigration Judge's reliance on *Dalton v. Ashcroft, supra*, which dealt with the question of whether vehicular assault involved the requisite risk of physical force to qualify as a crime of violence, was misplaced. The criminal statute involved in the *Dalton*

case required a reckless state of mind as to the risk of physical injury to the victim. However, the *mens rea* required in § 265.03-2 is the "intent to use [a loaded firearm] against another." Given the virtually unavoidable consequence of physical injury that will result from using a loaded firearm against another person, we find that the New York conviction involves a "substantial risk of physical force" and that it is, therefore, a crime of violence. *Cf. U.S. v. Dillard,* 214 F.3d 88, 93 (2d Cir. 2000 ("[f]irearms are instruments designed for the use of violent physical force, whether legal or illegal"). Because the respondent has been convicted of an aggravated felony, he is ineligible for the relief of cancellation of removal pursuant to section 240A(a)(3) of the Act. The respondent has sought no other relief from removal. Accordingly, the appeal will be sustained and the respondent will be ordered removed to Jamaica.

ORDER: The appeal is sustained.

FURTHER ORDER: The respondent is ordered removed to Jamaica.

/s/ Patricia A. Cole
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
York, Philadelphia [sic]

File A 42 259 751 August 16, 2004

In the Matter of

DERICK ANTHONY HENRY,	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(2)(C)

APPLICATION: Cancellation of removal as a permanent resident.

ON BEHALF OF RESPONDENT:	ON BEHALF OF GOVERNMENT:
Pro se	Maureen C. Gaffney, Esquire Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 50-year-old, married but separated male alien, native and citizen of Jamaica, admitted to the United States as a lawful permanent resident in January, 1990, placed into removal proceedings on or about May, 2004, by issuance of the Notice to Appear, form I-862. Set forth therein as allegation number 4 is a conviction under New York Penal Code 265.03 for criminal possession of a weapon, second degree in June 8, 2002 in Westchester County, New York, sentenced to a term of imprisonment of four years. The respondent appeared in Court

today pro se to prosecution [sic] his application for cancellation of removal as a permanent resident of the United States.

To this end, respondent appeared pro se. He has appended certain documentation to the record marked as group Exhibit 4 and provided testimony. I have listened to the respondent under oath, observed his demeanor and I assess the respondent's testimony as credible, although as Bureau counsel indicated, certain of the testimony surrounding the events in question concerning his arrest and conviction were a bit vague but I believe I understand the thrust of his testimony in this regard.

The respondent has two United States citizen children, one age 20 and the other age 12. The 20-year-old is a son, the 12-year-old is a daughter. He also has a son born in Jamaica who apparently lives in the United Kingdom with no lawful status in the United States. He was married in 1986 to a lawful permanent resident, separated in the mid-1990's, hasen't [sic] lived with her again, although he contends he's on good terms with her.

Respondent went on to testify he has supported his children, his son before he became a majority age and his daughter in the United States and his son in the United Kingdom whenever it's needed. His parents are deceased. He has a cousin in the United States and that's about the extent of his family ties. He has an 11th grade education from Jamaica. He's

lived in New York State his entire life in the United States. His last residence was in Yonkers.

He testified as to his employment which will not be repeated here. It does conform, more or less, with his information he placed in paragraph 38 of his written application. He contends he has never accepted unemployment insurance, has been steadily employed for most of his time in the United States albeit sometimes off the books, paid in cash basis. He contends he's filed all his income tax returns, including the year 2003, the latest.

Respondent admits to accepting public assistance for approximately one year after his release from incarceration in 2002 through 2003. He received food stamps and rental apartment payments. He has volunteered work in a nursing home and he did testify to a certain extent about some voluntary activities with a couple of other people in his neighborhood, although I guess it's the Court's fault for not following up on that to get more information from the respondent. In any event, he discussed his criminal record which dates from June 2000. His most serious is his Class C Felony for Criminal Possession of Weapon, Second. Sentenced to four years and served a bit over three years for that offense, maybe three and one-half. Was placed on parole upon his release in the Fall of 2002, was following his parole requirements, according to respondent, faithfully, had no problems with his Parole Officer, no problems on the streets, never been rearrested until he was picked up by immigration in

May of 2004. So the 18 months on the street, he contends he had no problems.

The respondent contends that he was working at a deli when a gentleman he knew approached the store. Respondent followed him outside whereupon the person apparently offered him a loaded handgun. The respondent indicated, or at least intimated, he was interested in purchasing the handgun because the deli where he worked had been robbed twice, held up by armed gunmen. He was there both times and the proprietor is an elderly woman so he had it in his mind that purchasing a handgun might be the right move to make to protect themselves, although he realizes now that was a mistake. He takes the gun to the back room. The police immediately come into the store and arrest him on the spot. The pre-trial investigation report appears to corroborate respondent's general testimony in this regard. It does seem respondent was correct that the police had been involved in this. I can't image [sic] that it was just serendipity or coincidence, taking a handgun to the back of the store and having the police arrive a moment later and find it on him. Obviously, this was some type of plan by someone, although certainly not diminimizing [sic] culpability, legal culpability or criminal culpability. Respondent now understands his criminality in this regard, although he indicates there was no victim involved. The only reason he was going to perhaps consider purchasing a gun or possessing it was to protect the store.

Respondent also testified that he was arrested in 1990 on marijuana-related charges but they were dismissed and that he was fined two times under the open container law for having open beer on the sidewalk, and he paid both those fines. If returned to society, respondent desires to resume his job at the shelter where he has worked through the company "West Hab". He'd been working full-time there, including overtime since October of last year and believes his employer would re-hire him. He has a couple of letters from his employers speaking highly of respondent and desiring him to remain in the United States.

The Court has applied the Board's decisions in *Matter of Sotelo*, 21 I&N Dec. 201 (BIA 2001), and *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998). In the latter regard the Board has indicated the general standards developed in considering applications under former Section 212(c) are applicable to the exercise of discretion under cancellation of removal. So, the Court has essentially applied the standards set forth in the Board's decision in *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The only difference is, unlike former Section 212(c) where certain offenses might have required "unusual or outstanding equities", the Board in *Matter of Sotelo* explained that such a showing is not relevant or needed for cancellation of removal for the reasons set forth herein.

The Court has considered all the respondent's testimony and the Court finds that he has testified credibly. I would observe that Bureau counsel was

concerned with the lack of documentation in this case. Certainly that's always a concern and that's not remiss to point that out. The Court will observe however, the respondent has no attorney, he's subject to mandatory custody, he's been working on his own, he was able to present some documents through efforts of his but not everything he desired, including letters from his son and tax returns. To this regard, respondent read from a letter from a cousin explaining that respondent's son was curious why his father had not received any letters from him or had not responded to letters. Respondent has explained to the Court he has received no letters from his son, although apparently the son had tried to write him. It's kind of difficult for respondents in these situations and Mr. Henry's certainly not the first respondent having difficulty obtaining documents. That it [sic] is why an assessment of credibility is important and I have assessed him credible in this regard. He has made efforts to work consistently since his arrival and has done so, apparently through documentation, but mostly through his testimony which the Court has accepted. So he has at least made efforts to be a contributing member of society in this regard. He's paid his taxes, he admits some of his work working in the deli and as a self-employed painter were "off the books." Obviously he won't have any tax returns for these, I'm assuming.

Other than the one conviction here, respondent has no criminal record to show that he is a recidivist The one conviction I would certainly agree with

Bureau counsel is serious in that respondent was sentenced to a four-year term of prison which is rather lengthy for New York State for a first offense. So it does show that the state was serious or saw his criminal activity as serious. I would point out, however, most of the time respondent spent was in county custody awaiting appeal of his conviction which was finalized on appeal. In other words, his appeal was rejected by the State Appellate Court and then he was transferred to state and spent the rest of the time in state custody. He attended mandatory Narcotics Anonymous and Alcoholics Anonymous. He believes he never needed to attend such on his own since he had neither a drug problem or an alcohol problem but he does inform that he did receive benefit by attending such courses. I will point out that there is no victim in this case as possessing the handgun in relation to a particular victim. The elements of the offense was with "intent to use," but the PSI does not show a particular victim, although as Bureau counsel points out, there's a PFA (protection from abuse order) against a certain person related to or friends with the man that respondent was going to purchase a handgun from. Respondent testified that this "victim" had caused a lot of trouble in the deli and the respondent had evicted him a couple of times and he believes it was a set-up by this person which caused him to be arrested by the police. I would note that respondent indicated that he was not informed that the victim was seeking a PFA order so this is one of those one-sided PFA orders, it seems to me, although it was made part of his sentence.

The respondent to me does not appear to be a person prone to violence. Possessing a handgun, without more, while not the most intelligent decision a person can make particularly since that person has no idea of how to fire a gun or what the damaging consequences to innocent people that could accrue if he ever pulled the trigger, it does not mean that the respondent is prone to violence. He has no history of violence before this and that will be to his benefit.

It also is important to the Court that the respondent has had the opportunity of going back out into society and proving he can conform. He spent approximately 18 months between his release from state custody and his detention by the Bureau during which time he was gainfully employed full-time. He was attending his parole requirements, he had no problems with society so the respondent does indicate, through his actions, that he can be a contributing member of society and a peaceful member of society.

What's important to the Court in this regard is that it does show respondent has that capability when given the opportunity he can conform with society's rules and regulations. One of the primary concerns of this Court when assessing whether or not to exercise the favorable exercise of discretion is whether the alien is likely to be a recidivist and cause for other problems with society. While respondent has not made the most intelligent choices, the Court will give the benefit of the doubt to him, based upon his history here, that he is not likely to be a

further burden on society or a danger to society in this regard. So the threat of recidivism while obviously present in every case, is probably minimized in this case.

After considering all the facts and circumstances of the case, the Court believes the exercise of discretion should be awarded to the respondent and will grant him the relief he seeks. The respondent apparently has a job opportunity he can return to. The Court believes he ought to be given the benefit of the doubt and that by making this decision the Court does not believe that society's going to endangered [sic] to any appreciable degree. Further, respondent should be made to complete his sentence of serving his probation in which the State of New York, through its probation offices, can keep an eye on the respondent to ensure he's complying with society's expectations. Accordingly based upon the foregoing, the following order is hereby entered:

ORDER

ORDERED: Respondent's application for cancellation of removal under Section 240A(a) is hereby granted in the exercise of discretion.

/s/ Walter Durling
WALTER DURLING
United States Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
YORK, PENNSYLVANIA

IN THE MATTER OF:	)	**IN REMOVAL**
HENRY, Derick Anthony	)	**PROCEEDINGS**
	)	
Respondent	)	**File # A 42 259 751**
	)	

ON BEHALF OF RESPONDENT:
Pro se

ON BEHALF OF THE BUREAU:

GROUNDS OF REMOVAL: Weapons Offense; Crime of Violence

INTERLOCUTORY RULING ON AGGRAVATED FELONY

Respondent is a 50-year-old single male alien, native and citizen of Jamaica, who adjusted status to lawful permanent resident in January 1990. On May 25, 2004, he was served a Notice to Appear, Form I-862. Therein is alleged a June 8, 2000, New York conviction for criminal possession of a weapon, 2nd degree, in violation of NYPL § 265.03, a class C felony, and for which he was sentenced to four years of supervised probation.

The Bureau has charged respondent with two violations of the Immigration and Nationality Act, sections 237(a)(2)(C) and 237(a)(2)(A)(iii). At prior

proceedings the court was satisfied that the record established a firearms offense per section 237(a)(2)(C). Pursuant to the following discussion, however, the aggravated felony ground of removal as a "crime of violence" as defined in section 101(a)(43)(F) will be dismissed.

> NYPL § 265.03. Criminal possession of a weapon in the second degree.
> *A person is guilty of criminal possession of a weapon in the second degree when, with intent to use the same unlawfully against another:*
> *(1) He possesses a machine-gun; or*
> *(2) He possesses a loaded firearm; or*
> *(3) He possesses a disguised gun.*

The definition of aggravated felony constituting a "crime of violence" as set forth at section 101(a)(43)(F) of the INA is found at 18 U.S.C. §16:

> *(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or*
>
> *(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.*

The Bureau has charged respondent with an aggravated felony "crime of violence" due to the state element "of intent to use the same unlawfully against another." Bureau counsel equates this element with

"force" under 18 U.S.C. § 16(b) in that the nature of the offense involves substantial risk that physical force is implied with intending to use a loaded firearm.[1]

First, while a number of documents have been submitted by the Bureau, the Sentence and Commitment sheet clearly establishes respondent's conviction; there's no need to inquire further to determine the extent of the conviction. Moreover, in *Francis v. Reno*, *supra*, the Third Circuit found that the Board had erred in determining that an alien's conviction for vehicular manslaughter in Pennsylvania was a crime of violence, further finding fault with the Board's reliance on the criminal complaint, instructing that "§16(b) requires that we focus upon the nature of the underlying felony rather than the conduct that caused Francis to be convicted of the felony." *Id* at 174. The court went on to emphasize that, since it's the nature of the underlying offense which is at issue, the "categorical approach" is utilized where the "sentencing court can look only to the fact of conviction and the statutory definition of the prior offense. The court's analysis is not controlled by the conduct giving rise to the conviction," citing to its decision in *United States v. Galo*, 239 F.3d 572, 577 (3rd Cir. 2000). *Id* at 174. After considering the text of

[1] Section 16(a) is not implicated because the statute is "narrowly drawn" and thus the element of "use, attempted use, or threatened use" of force is not an element of the state statute. *Francis v. Reno*, 269 F.3d 162, 168 (3rd Cir. 2001).

the state statute involved, the court found that the conviction for vehicular homicide was not an offense which would implicate § 16(b).

As point of fact, the analysis of the Third Circuit in *Francis* tracks with the same analysis which the Second Circuit employed in *Dalton v. Ashcroft,* 257 F.3d 200 (2nd Cir. 2003). There, the Second Circuit, in examining an alien's federal New York conviction for operating a vehicle while intoxicated, rejected the government's contention that physical force necessarily equates with harm or injury. Stated differently, the Second Circuit recognizes that "there is a difference between the causation of an injury and an injury's causation by the use of physical force." *Chrzanoski v. Ashcroft;* 327 F.3d 188 (2nd Cir. 2003). The *Dalton* court extemporized that while there is a notorious risk of an accident in drunken driving, "it is not the risk that the driver will us [sic] 'physical force' in the course of driving the vehicle. Indeed, in the context of driving a vehicle, it is unclear what constitutes the use of physical force. The physical force cannot reasonably be interpreted as a foot on the accelerator or a hand on the steering wheel. Otherwise, all driving would, by definition, involve the use of force . . . " *Id* at 206.

The same analysis of New York's weapons possession statute results in the same outcome. One may violate the statute without any utilization of "physical force." While one may reasonably argue that a bullet fired from an illegally possessed handgun will exert a great amount of "physical force" upon the victim upon impact, such outcome is different only in degree

from that which results from an accident caused by a drunken driver crashing his car into the victim, and one which the [sic] both the Third and Second Circuits would reject. In the case of the handgun, about the only "physical force" exerted by the possessor is that force exerted on the trigger mechanism, much the same as the exertion of force on the gas pedal of the vehicle driven by a drunken driver. Finally, the Second Circuit in *Dalton* discounted as relevant the intention to drive, it being different from actually driving. *Dalton*, *supra,* at 206. So, too, the intention to use a loaded weapon unlawfully against another is not the same as using the weapon, although, as discussed, it is not the "intention to use" element which is outcome determinative; rather, it is the omission of the nature of the underlying offense as involving "physical force" while [sic] requires a dismissal of this ground of removal. Thus, using the "categorical approach" to § 16(b), as required by *Francis v. Reno*, *supra*, there is no underlying "nature of physical force" inherent in a violation of NYPL § 265.03.

Accordingly, as the Bureau has failed to met [sic] its burden of proof by clear and convincing evidence, section 240(c)(3)(A), that a violation of NYPL § 265.03 is a "crime of violence," the aggravated felony ground of removal will be dismissed.

ORDER: The ground of removal pursuant to section 237(a)(2)(A)(iii) INA is dismissed.

/s/ Walt Durling
Walt Durling
Immigration Judge

June 25, 2004

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(2)

No. 07-487

FILED
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SUPREME COURT, U.S.

In the Supreme Court of the United States

DERICK ANTHONY HENRY, PETITIONER

v.

BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether second-degree possession of a loaded firearm with intent to use the same unlawfully against another, in violation of New York law, is a "crime of violence" under 18 U.S.C. 16(b), and therefore qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F).

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In the Supreme Court of the United States

No. 07-487

DERICK ANTHONY HENRY, PETITIONER

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BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 493 F.3d 303.[1] The decisions of the Board of Immigration Appeals (Pet. App. 17-21) and the immigration judge (Pet. App. 22-30) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 2007. The petition for a writ of certiorari was filed on October 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Although the decision below is captioned *Henry* v. *Bureau of Immigration and Customs Enforcement*, 8 U.S.C. 1252(b)(3)(A) provides that the proper respondent to a petition seeking judicial review of a final order of removal is the Attorney General.

STATEMENT

1. Petitioner is a native and citizen of Jamaica. Pet. App. 3, 22. In 1990, he was admitted to the United States as a lawful permanent resident. *Ibid.* In 2000, he pleaded guilty in a New York state court to second-degree criminal possession of a weapon in violation of New York law. *Id.* at 3, 18, 22. The statute under which petitioner was convicted provided:

> A person is guilty of criminal possession of a weapon in the second degree when, with intent to use the same unlawfully against another:
>
> (1) He possesses a machine-gun; or
> (2) He possesses a loaded firearm; or
> (3) He possesses a disguised gun.
>
> Criminal possession of a weapon in the second degree is a class C felony.

N.Y. Penal Law § 265.03 (McKinney 1998). Petitioner was indicted for, and pleaded guilty to, possessing a loaded revolver with intent to use it unlawfully against another person. Pet. App. 3. He was sentenced to four years of imprisonment. *Id.* at 4, 18, 22.

2. In 2004, the Department of Homeland Security (DHS) commenced removal proceedings against petitioner based on his 2000 conviction. Pet. App. 22, 31. DHS charged petitioner under 8 U.S.C. 1227(a)(2)(C), which makes illegal possession of a firearm a removable offense, and 8 U.S.C. 1227(a)(2)(A)(iii), which makes commission of an "aggravated felony" a removable offense. DHS alleged that petitioner's 2000 conviction qualified as a "crime of violence" within the meaning of 18 U.S.C. 16, and was therefore an "aggravated felony." Pet. App. 4, 18, 31; see 8 U.S.C. 1101(a)(43)(F) (defining

"aggravated felony" as, *inter alia*, "a crime of violence," as defined in 18 U.S.C. 16, for which the term of imprisonment was at least one year). Under 18 U.S.C. 16, a "crime of violence" is:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The immigration judge (IJ) found petitioner removable on the ground that his 2000 conviction qualified as a removable firearm possession offense under 8 U.S.C. 1227(a)(2)(C). Pet. App. 5, 30. But in an interlocutory order, the IJ dismissed the aggravated felony charge, finding that petitioner's firearm possession conviction was not a "crime of violence" under 18 U.S.C. 16(b). Pet. App. 31-36. The IJ accordingly found petitioner to be eligible for cancellation of removal—relief available only to an alien who can demonstrate, among other things, that he "has not been convicted of any aggravated felony," 8 U.S.C. 1229b(a)—and exercised his discretion to cancel petitioner's removal. Pet. App. 22-30.

3. The Board of Immigration Appeals (BIA) reversed. Pet. App. 17-21. The BIA found that petitioner's firearm possession conviction qualified as a "crime of violence" under 18 U.S.C. 16(b) because "a crime that involves possession of a loaded firearm with the intent to use the firearm unlawfully against another 'by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'" Pet. App. 20

(quoting 18 U.S.C. 16(b)). The BIA thus concluded that petitioner's 2000 conviction was an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F), and therefore rendered him ineligible for cancellation of removal. Pet. App. 21.

4. The court of appeals affirmed. Pet. App. 1-16. The court held that, because the New York offense of second-degree criminal possession of a weapon has as an element the intent to use the firearm unlawfully against another person, it is an offense that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," and is thus a "crime of violence" under 18 U.S.C. 16(b). See Pet. App. 3, 9-12.

The court of appeals relied on its prior decision in *Impounded*, 117 F.3d 730 (3d Cir. 1997), which considered whether the Virgin Islands offense of possessing a "dangerous or deadly weapon" with "*intent to use* the same unlawfully against another" qualified as a predicate for transferring a juvenile from state to federal court for criminal prosecution under the mandatory transfer provisions of 18 U.S.C. 5032. See *Impounded*, 117 F.3d at 738. The court in that case held that the Virgin Islands weapons offense did qualify for mandatory transfer because an offense that "includes as an element the *intent* to use a dangerous weapon" is an offense that, "by its very nature, involves a substantial risk that physical force against the person of another may be used in committing the offense." *Id.* at 737-738 (quoting 18 U.S.C. 5032). Noting that both the Virgin Islands criminal statute at issue and the language of the juvenile transfer provisions"for all relevant purposes are identical to the statute of conviction and enumerating statutes applicable" to petitioner, Pet. App. 9-10, the court of ap-

peals considered the reasoning of *Impounded* to be both binding and persuasive, *id.* at 12.

The court of appeals rejected petitioner's contention that a violation of N.Y. Penal Law § 265.03 does not involve a substantial risk of the use of force "in the course of committing the offense" for purposes of Section 16(b). Pet. App. 13-16. Petitioner argued that this statutory language meant that a court may not consider any risks that force will be used after "the crime is complete," and for support cited the Third Circuit's prior decision in *United States* v. *Hull*, 456 F.3d 133 (2006), which held that possession of a pipe bomb is not a crime of violence under Section 16(b) because "[t]here is no risk that physical force might be used against another to commit the offense of *possession*," *id.* at 139 (brackets in original). See Pet. App. 13.

The court distinguished *Hull* on the ground that, while "possession *alone* does not permit the inference that there is a substantial risk of the use of force," Pet. App. 13-14 (emphasis added), "the New York statute under which [petitioner] was convicted * * * require[s] proof not only of possession but also of intent to use a weapon unlawfully against another," *id.* at 14. The court concluded that, "[u]nder *Hull*, proof of the intent element satisfies the requirement that [Section] 16(b) 'crimes are those raising a substantial risk that the actor will intentionally use force in the furtherance of the offense.'" *Id.* at 15.

The court also noted that petitioner's argument would exclude burglary, "[t]he classic example" of a crime that falls within Section 16(b). Pet. App. 15 (brackets in original) (quoting *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004)). The court explained that "the requisite elements of a burglary are complete once the burglar en-

ters [a building or other structure] and possesses the necessary mental element," but the "substantial risk that the burglar will use force comes from the possibility that the burglar will encounter another during the course of the burglary," after "the technical elements have already been accomplished." *Id.* at 15-16.

ARGUMENT

Petitioner renews his contention (Pet. 7-17) that the court below erred in finding that his conviction for possession of a loaded firearm with intent to use it unlawfully against another person is a "crime of violence" under 18 U.S.C. 16(b), and therefore qualifies as an "aggravated felony" that renders him ineligible for cancellation of removal under 8 U.S.C. 1229b(a). Further review of that contention is unwarranted.

1. a. The court of appeals correctly held that petitioner's 2000 conviction for violation of N.Y. Penal Law § 265.03 qualifies as a "crime of violence" because it is an offense that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," 18 U.S.C. 16(b). As the court of appeals concluded, when a crime includes "intent to use a dangerous weapon" against another person as an element of the offense, as in this case, "the commission of the crime will therefore present a substantial risk that physical force will be used." Pet. App. 10 n.3 (quoting *Impounded*, 117 F.3d 730, 731 (3d Cir. 1997)).

b. Petitioner contends (Pet. 15-17) that the decision below "in effect reads the phrase 'in the course of committing the offense' out of the statute * * * [b]y holding that the substantial risk of physical force may arise at any time." Pet. 16. Petitioner contends that, because

"all elements of a possession offense are satisfied as soon as the offender takes possession of the weapon and has the requisite mental state," "few, if any, weapons possession crimes" in fact present a substantial risk that force will be used "in the course of committing the offense." Pet. 7-8.

Petitioner's contention is incorrect. Far from "read-[ing] the phrase 'in the course of committing the offense' out of the statute," Pet. 16, the court of appeals properly found that there is a substantial risk that a criminal defendant will use physical force against another person "in the course of" unlawfully intending to do so.[2] See Pet. App. 13-16. Moreover, categorically to exclude

---

[2] Petitioner points (Pet. 16-17) to the court of appeals' reliance on its prior decision in *Impounded* as evidence that the court applied the incorrect "crime of violence" standard. Specifically, petitioner contends that *Impounded* "relied heavily" on cases interpreting United States Sentencing Guidelines § 4B1.2, which, following its amendment in 1989, defines "crime of violence" as, *inter alia*, an offense that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 4B1.2(a)(2). Noting that this Court has distinguished the 18 U.S.C. 16(b) definition from the Guidelines § 4B1.2(a)(2) definition, petitioner contends that the court below "erred in relying on [*Impounded*]." Pet. 17; see *ibid.* (citing *Leocal*, 543 U.S. at 10 n.7). But as the court of appeals explained, before 1989, Guidelines § 4B1.2 incorporated the definition of "crime of violence" set forth in 18 U.S.C. 16. See Pet. App. 11-12. The court thus found that "cases interpreting § 16 in the sentencing context remain relevant." *Id.* at 12. In any event, the court of appeals made clear that it was, in fact, applying the Section 16(b) definition, identifying the relevant inquiry as "whether the possession of a loaded firearm with intent to use the same unlawfully against another involves a substantial risk that the actor will intentionally use physical force in committing his crime." *Id.* at 8. The text of the statute at issue in *Impounded* (18 U.S.C. 5032) is essentially the same for present purposes. See *id.* at 9.

from consideration any risks that arise immediately after the elements of the crime are satisfied would unduly narrow the scope of the statute. For example, as the court of appeals noted, this Court has identified burglary as "the classic example" of a Section 16(b) offense, because "burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime." *Leocal*, 543 U.S. at 10. On petitioner's view, the burglary would be "complete" once its elements are satisfied: that is, as soon as the burglar unlawfully enters, or remains in, a building or other structure, and has the requisite mental state. See Pet. App. 15 (citing *Taylor* v. *United States*, 495 U.S. 575, 598 (1990)). But this Court has never viewed the offense, nor the risks associated with the offense, so narrowly. As the Court has explained, the risks that force will be used in the course of a burglary relate as much to the possibility that the burglar will provoke a violent confrontation with an occupant, caretaker, or person who comes to investigate *after* he has already gained unlawful entry, as they do to the possibility that the burglar will be intercepted at the threshold. See *James* v. *United States*, 127 S. Ct. 1586, 1594-1595 (2007).

2. Petitioner contends (Pet. 9-14) that this Court's review is warranted because the decision below conflicts with the decisions of other courts of appeals. There is, however, no conflict in the circuits that warrants this Court's review.

a. Petitioner places principal reliance (Pet. 9-10) on a series of Fifth Circuit decisions that have held that weapons possession offenses do not qualify as "crime[s] of violence" under 18 U.S.C. 16(b). See *United States* v. *Diaz-Diaz*, 327 F.3d 410 (5th Cir.) (Texas offense of possessing a short-barreled firearm is not a "crime of vio-

lence"), cert. denied, 540 U.S. 889 (2003); *United States* v. *Medina-Anicacio*, 325 F.3d 638 (5th Cir. 2003) (California offense of carrying a concealed dirk or dagger is not a "crime of violence"), cert. denied, 542 U.S. 911 (2004); *United States* v. *Hernandez-Neave*, 291 F.3d 296 (5th Cir. 2001) (Texas offense of carrying a firearm into a place licensed to sell alcoholic beverages is not a "crime of violence"). Notably, in none of those cases did the statute of conviction have, as an element, intent to use the weapon against another person. See *Diaz-Diaz*, 327 F.3d at 414; *Medina-Anicacio*, 325 F.3d at 644; *Hernandez-Neave*, 291 F.3d at 299. Those holdings are thus consistent with the decision below, which reaffirmed circuit precedent holding that "mere possession" of a weapon, absent intent to use the weapon against another person, is not a "crime of violence." See Pet. App. 13 (discussing *United States* v. *Hull*, 456 F.3d 133 (3d Cir. 2006)).

Petitioner asserts, however, that the two courts have differed in their reasoning, if not in their holdings, in respects that are relevant to the question in this case. Specifically, petitioner notes that the Fifth Circuit has reasoned that possession offenses are not "crime[s] of violence" because the use of force is not "necessary to effectuate the offense" of possession. Pet. 9 (quoting *Medina-Anicacio*, 325 F.3d at 646). Petitioner further notes that, in each case, the Fifth Circuit considered the possession crime to be "complete upon possession of the weapon and the requisite mental state." Pet. 10 (citing *Diaz-Diaz*, 327 F.3d at 414; *Medina-Anicacio*, 325 F.3d at 645-646; and *Hernandez-Neave*, 291 F.3d at 299). Petitioner suggests (Pet. 15-16) that, on the Fifth Circuit's reasoning, possessing a weapon with intent to use it unlawfully against another person would be treated no

differently than "mere possession," because there is no risk that "violence will be used in order to commit" the elements of possession with a certain mental state.

Petitioner overstates the difference in the language of the decisions, which in any event have not given rise to any conflict in holdings. The Third Circuit, much like the Fifth Circuit, has described Section 16(b) as encompassing those offenses "raising a substantial risk that the actor will intentionally use force *in the furtherance of the offense*." Pet. App. 15 (quoting *Hull*, 456 F.3d at 140 (emphasis added)). The court found that test met in this case, in which the offense of conviction required a finding of intent to use physical force unlawfully against another person. *Ibid.* And the Fifth Circuit, for its part, has left open the possibility of adopting a similar analysis in an appropriate case. In *Medina-Anicacio*, for example, it specifically noted that, under the state law at issue, a "defendant's intended use of the instrument is neither an element of the offense nor a defense," 325 F.3d at 644 (citation omitted), and implicitly suggested that, where "the intent element [of the offense] * * * applies to conduct that is 'violent by nature,'" as opposed to the "non-violent act" of possessing or carrying a weapon, that fact might be relevant to its analysis, *id.* at 646 n.6. The Fifth Circuit has, moreover, made clear that it is irrelevant to its analysis whether one considers possession offenses to be "continuing courses of conduct," as opposed to offenses completed immediately upon acquisition of the weapon. See *id.* at 646-647 & n.8 ("While it is plausible to view the offense of possessing a concealed dirk or dagger as a 'course of conduct', it is not relevant to our analysis."). It is thus unclear that the Fifth Circuit would reach a different result on the facts of this case.

Petitioner also contends that the Second and Fourth Circuits "apparently view Section 16(b)'s 'in the course of committing the offense' requirement similarly to the Fifth Circuit." Pet. 10. Neither *Jobson* v. *Ashcroft*, 326 F.3d 367 (2d Cir. 2003), nor *Bejarano-Urrutia* v. *Gonzales*, 413 F.3d 444 (4th Cir. 2005), however, addressed the question petitioner raises in this case.

In *Jobson*, the court held that second-degree manslaughter under New York law, defined as "recklessly caus[ing] the death of another person," is not a "crime of violence" under Section 16(b). 326 F.3d at 372. The court did, as petitioner notes (Pet. 10), state that "the risk in [S]ection 16(b) concerns the defendant's likely use of violent force as a means to an end," *id.* at 373, but it did not hold that second-degree manslaughter does not qualify as a "crime of violence" because it does not present a risk that the defendant will use violent force as a means to the specific end of accomplishing the elements of that offense. Rather, the court explained: "[T]he verb 'use' in section 16(b), particularly when modified by the phrase 'in the course of committing the offense,' suggests that section 16(b) * * * refers only to those offenses in which there is a substantial likelihood that the perpetrator will *intentionally* employ physical force." *Ibid.* The court held that second-degree manslaughter, which encompasses "unintentional accident[s] caused by recklessness," therefore "cannot properly be said to involve a substantial risk that a defendant will *use* force." *Ibid.* (emphasis added). That holding is consistent with the law in the Third Circuit, which has also concluded that "a crime of violence under [Section] 16(b) must involve a substantial risk that the actor will intentionally use physical force in committing his crime." Pet. App. 8 (quoting *Tran* v. *Gonzales*, 414 F.3d 464, 472

(3d Cir. 2005)). The court in *Jobson* did not consider the distinct question before the court of appeals in this case: whether an offense that has, as an element, the intent to use physical force, qualifies as a "crime of violence" under Section 16(b).

Similarly, in *Bejarano-Urrutia*, the Fourth Circuit held that involuntary manslaughter in violation of Virginia law, which requires "the killing of a person as a proximate result of the defendant's reckless disregard for human life," 413 F.3d at 446, is not a "crime of violence" under Section 16(b). *Id.* at 446-447. Citing *Jobson*, the court reasoned that, although involuntary manslaughter "intrinsically involves a substantial risk that the defendant's actions will cause physical harm, it does not intrinsically involve a substantial risk that force will be applied 'as a means to an end.'" *Ibid.* (quoting *Jobson*, 326 F.3d at 373). But in *Bejarano-Urrutia*, like *Jobson*, the court made clear that its decision rested not on an assessment of whether involuntary manslaughter presents a risk that force will be used as a means to committing the specific end of accomplishing the elements of that offense, but rather on an assessment of whether involuntary manslaughter involves a risk that force will *intentionally* be used in the course of committing that offense. See *id.* at 447 (finding that the "reckless disregard for human life" required under the Virginia involuntary manslaughter statute "is distinguishable from a reckless disregard for whether force will need to be used," which is the touchstone of the Section 16(b) inquiry under *Leocal*, 543 U.S. at 10). That holding is consistent with the decision below, which held that a crime that, by definition, involves an intent to use force, is a "crime of violence" under Section 16(b).

Finally, petitioner contends (Pet. 11) that the Ninth Circuit "has cast the Section 16(b) net even wider than the Third Circuit," by holding that the federal offense of being a felon in possession of a firearm qualifies as a "crime of violence" under the 1988 version of Sentencing Guidelines § 4B1.2, which incorporated the Section 16 definition by reference. See *United States* v. *O'Neal*, 937 F.2d 1369, 1375 (9th Cir. 1991). After the defendant in *O'Neal* committed the relevant offense, however, the Sentencing Commission both (1) adopted a new definition of "crime of violence" that closely tracks the definition of "violent felony" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B), rather than the definition of "crime of violence" under 18 U.S.C. 16, and (2) clarified in the commentary to Guidelines § 4B1.2 that the crime of being a felon in possession does not qualify as a "crime of violence." See, *e.g.*, *United States* v. *Sahakian*, 965 F.2d 740, 742-743 (9th Cir. 1992). *O'Neal* is thus no longer good law. See, *e.g.*, *ibid.*; *United States* v. *Garcia-Cruz*, 40 F.3d 986, 990 (9th Cir. 1994) (holding that being a felon in possession of a firearm is not a "crime of violence" under either the 1988 version of Guidelines § 4B1.2, or the amended version of that Guideline).

b. Petitioner also contends (Pet. 11-14) that the courts of appeals are divided with respect to whether the federal offense of being a felon in possession of a firearm, see 18 U.S.C. 922(g)(1), qualifies as a "crime of violence" under the definition set forth in the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* That statute, like Section 16, defines a "crime of violence" as, *inter alia*, "[an] offense that is a felony and that, by its nature, involves a substantial risk that physical force against the

person or property of another may be used in the course of committing the offense." 18 U.S.C. 3156(a)(4)(B).

Petitioner is correct that there has been disagreement among the circuits with respect to whether violation of Section 922(g)(1) is a "crime of violence" for purposes of the Bail Reform Act, which, *inter alia*, provides for pretrial detention of the defendant in a case that involves a "crime of violence." 18 U.S.C. 3142(f)(1)(A). Compare *United States* v. *Dillard*, 214 F.3d 88, 104 (2d Cir. 2000) (holding that being a felon in possession of a firearm is a "crime of violence" for purposes of pretrial detention under the Bail Reform Act), cert. denied, 532 U.S. 907 (2001), with *United States* v. *Ingle*, 454 F.3d 1082, 1085-1086 (10th Cir. 2006) (holding that being a felon in possession of a firearm is not a "crime of violence" under the Bail Reform Act); *United States* v. *Bowers*, 432 F.3d 518, 524 (3d Cir. 2005) (same); *United States* v. *Johnson*, 399 F.3d 1297, 1302 (11th Cir. 2005) (per curiam) (same); *United States* v. *Twine*, 344 F.3d 987, 988 (9th Cir. 2003) (per curiam) (same); *United States* v. *Lane*, 252 F.3d 905, 906-908 (7th Cir. 2001) (same); *United States* v. *Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999) (same). Cf. *United States* v. *Rogers*, 371 F.3d 1225, 1225-1226, 1229-1230 (10th Cir. 2004) (holding that possession of a firearm while subject to a protection order and possession of a firearm following conviction for a misdemeanor crime of domestic violence are "crimes of violence" under the Bail Reform Act, and distinguishing that question from the question whether being a felon in possession qualifies as a "crime of violence").

Congress has since amended the Bail Reform Act to make clear that the government may move for pretrial detention in cases that involve "any felony that is not otherwise a crime of violence * * * that involves the

possession or use of a firearm or destructive device, * * * or any other dangerous weapon." Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 216(2)(B), 120 Stat. 617 (to be codified at 18 U.S.C. 3142(f)(1)(E) (2006)). In any event, this case concerns neither the Bail Reform Act nor the federal felon-in-possession statute. Moreover, Section 922(g)(1) does not have, as an element, an intent to use the firearm against another person. There is therefore no square conflict between the decisions holding that violation of Section 922(g)(1) is not a "crime of violence" under the Bail Reform Act and the decision below, which expressly distinguishes "mere possession" offenses from possession of a weapon with intent to use it unlawfully against another person. See Pet. App. 13-15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

DERICK ANTHONY HENRY,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA (BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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INTRODUCTION

This case concerns the correct interpretation of only one element of the definition of "crime of violence" in 18 U.S.C. § 16(b): the requirement that the crime present a substantial risk that physical force may be used "in the course of committing the offense." 18 U.S.C. § 16(b). The issue is whether Section 16(b) includes only those crimes which create a substantial risk that physical force may be necessary *in order to complete the offense*.

ARGUMENT

1. Respondent has focused solely on the fact that the crime at issue is possession of a weapon with intent to use it, as opposed to a "simple" weapons possession offense that does not include the "intent to use" element. Opp. at 6-15. While intent to use a weapon may convert a simple possession offense into a crime that presents "a substantial risk that force may be used," the increased likelihood of the use of force is, we submit, irrelevant to the question raised by this case: whether, as the Fifth Circuit has held, Section 16(b) includes only those crimes which involve a risk that force may be "necessary to effectuate" the crime. *See, e.g., United States v. Medina-Anicacio*, 325 F.3d 638, 646 (5th Cir. 2003), *reh'g denied*, 91 Fed. Appx. 975 (5th Cir.), *cert. denied*, 542 U.S. 911 (2004). Like simple possession offenses, possession of a weapon with intent to use it does not

present any risk that the offender may need to use force in order to perpetrate the possession offense itself.

The court of appeals in this case relied almost exclusively on the fact that Petitioner's offense included the "intent" element. It held that its prior decision in *Impounded*, 117 F.3d 730 (3d Cir. 1997), was dispositive because of the intent element alone. App. at 12-15. However, in *Impounded*, the court of appeals did not address the "in the course of committing the offense" language. It made no distinction between decisions interpreting Section 16(b)'s definition of "crime of violence" and other decisions involving provisions that do not include the "in the course of committing the offense" (or other similar) language, and relied upon both types of decisions interchangeably in its brief analysis. *Impounded*, 117 F.3d at 738. Thus, both *Impounded* and the decision below necessarily failed to give any effect to the "in the course of committing the offense" requirement.

The decision below and *Impounded* both expressly recognize that the intent element of the offense at issue here really goes to whether the risk that physical force may be used is "substantial," not to whether that risk arises "in the course of committing the offense." App. at 12 (stating that the court was "bound by" its prior "analysis that the intent to use creates a substantial risk of the use of physical force . . . "); *Impounded*, 117 F.3d at 738 ("[c]ertainly if someone intends to use a dangerous weapon then there is 'substantial risk that physical force . . . may

be used'"). In contrast, the Fifth Circuit has given effect to all of Section 16(b)'s requirements, holding that neither possession of a concealed dagger nor possession of a short-barrel firearm is a "crime of violence" – despite their almost exclusively violent uses – because there is "no substantial risk that an offender may use violence *to perpetrate the weapon possession offense*." *Medina-Anicacio*, 325 F.3d at 647 (emphasis added); *United States v. Diaz-Diaz*, 327 F.3d 410 (5th Cir.), *cert. denied*, 540 U.S. 889 (2003).

2. Respondent argues that the Fifth Circuit's (and our) interpretation of "in the course of committing the offense" is too narrow because it would exclude burglary. Opp. at 7-8; *see also* App. at 15-16. This is incorrect. We recognize that burglary is the "classic" example of a Section 16(b) crime of violence. Pet. at 15. Moreover, this Court has noted that burglary is covered by Section 16(b) "*not* . . . because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim *in completing the crime*." *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (first emphasis in original; second emphasis added). Rather than excluding burglary from Section 16(b)'s definition of "crime of violence," the Fifth Circuit's (and our) interpretation of "in the course of committing the offense" mirrors that assumed by this Court in explaining why burglary is a "classic example" of a Section 16(b) crime of violence. *Id.* In contrast, there is no risk that a weapons possession offender – regardless of intent – will need to use force "in completing the [possession] crime." *See id.*

3. Contrary to Respondent's argument, Opp. at 13-15, the disagreement among the courts of appeals with respect to the meaning of the phrase "in the course of committing the offense" contained in the "crime of violence" definition in the Bail Reform Act, 18 U.S.C. §§ 3141-56, has not been resolved by Congress. Although the Bail Reform Act now specifically allows the government to move for pretrial detention of both individuals who commit "crimes of violence" and those who commit "any felony that is not otherwise a crime of violence" which involves the possession of firearms or other dangerous weapons, 18 U.S.C. § 3142(f)(1)(E), the Bail Reform Act amendment did not affect what offenses constitute "crimes of violence" or change the meaning of the phrase "in the course of committing the offense." Although it is now clear that the government may move for pretrial detention in even "simple" weapons possession cases, the Court's guidance in interpreting the "in the course of committing the offense" language is still needed to ensure the consistent enforcement of both the Bail Reform Act and statutes that incorporate Section 16(b).

4. Respondent is mistaken in stating that the Ninth Circuit's decision in *United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1991), is "no longer good law." Opp. at 13. Although the sentencing guideline at issue in *O'Neal* no longer incorporates Section 16's "crime of violence" definition, the *O'Neal* court nevertheless interpreted Section 16(b), and the court's holding that conviction of a felon for even "simple" possession is a "crime of violence" under Section 16(b)

remains the law in that circuit. The Ninth Circuit's later statement (*see* Opp. at 13) that *O'Neal* improperly ignored the Sentencing Guidelines Commentary has no effect on the validity of *O'Neal's* interpretation of Section 16(b) outside of the sentencing context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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